90-228

(1)

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PAUL R. COUTURE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits a brief investigative stop where police have reliable information that a suspect is carrying a handgun late at night in a convenience store and on public roadways.

OPINION BELOW

The opinion of the court below (App. A) is reported at 407 Mass. 178, ___ N.E.2d ___ (1990).

JURISDICTION

The decision of the court below denying a petition for rehearing was on May 3, 1990. (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On February 12, 1988, a complaint was sworn to in the Lowell Division of the District Court Department of the Commonwealth of Massachusetts against respondent Paul R. Couture for the unlawful possession of a firearm without a license. Mass. Gen. Laws c. 269, §10(a). After bench trial, Couture appealed to the jury session, and filed a pretrial motion to suppress evidence, i.e. the handgun seized from his vehicle. The trial court allowed the motion to suppress and issued findings and rulings. (App. C). The Commonwealth took an interlocutory appeal.

The Supreme Judicial Court affirmed the order of the district court. The court first held that because in

Massachusetts it is legal to possess a firearm if one has a license, and the police only knew that "a man had been seen in public with a handgun. . . . this unadorned fact, without any additional information suggesting criminal activity, does not give rise to probable cause. . . to believe that the individual is illegally carrying that gun." Commonwealth v. Couture, 407 Mass. at 180-181 (1990).[1/]

More significantly, for purposes of this petition the court also held that

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1/ The court relied on Commonwealth v. Toole, 389 Mass. 159, 448 N.E.2d 1264 (1983) for its holding that "the ownership or possession of a handgun . . . is not a crime and standing alone creates no probable cause." Couture, 407 Mass. at 179-181. Toole, 389 Mass. at 163, 448 N.E.2d at 1268, however, is based entirely on Commonwealth v. Moon, 380 Mass. 751, 759-760, 405 N.E.2d 947, 953 (1980) and Moon, in turn, relied exclusively on federal constitutional law citing the Fourth Amendment, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221-222 (1968) and Cardwell v. Lewis, 417 U.S. 583, 592 (1974).

> the Commonwealth is incorrect in its claim that the stop and subsequent search of the vehicle was justified under the principles of Terry v. Ohio, 392 U.S. 1 (1968). There is no question that the stop of the pickup truck constituted a seizure within the meaning of the Fourth Amendment to the United States Constitution. See United States v. Cortez, 449 U.S. 411, 417 (1981); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, supra. As we discussed above, there is absolutely no indication that the defendant in this case was engaged in criminal activity. The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles.

Commonwealth v. Couture, 407 Mass. at 183.

The Commonwealth petitioned for rehearing, which was denied on May 3, 1990.

STATEMENT OF FACTS

On February 11, 1988, at approximately 11:35 p.m., Officers Gary Richardson and Steven Morril of the Lowell Police Department were patroling the Belvedere section of Lowell, Massachusetts, in a marked police cruiser when they received a radio broadcast. (App. D. pp. 26-27). They were informed that a call had been received from the clerk of the Li'l Peach convenience store on Rogers Street in Lowell. Officer Richardson had been a Lowell police officer for nine years. (App. p. 25-26). The clerk informed the dispatcher that a man inside the store had a small handgun, with white pistol grip protruding from his right rear pocket. (App. p. 27). The clerk said the man had just left the store, entered a green or gray Dodge pick-up truck with a New Hampshire license plate number.

(App. p. 28). The clerk reported the registration number to the police, and the direction in which the truck was travelling. (App. p. 28).

As Officers Richardson and Morril drove towards the convenience store, they received a second radio broadcast from a national park ranger stating that the ranger was following a truck which matched the description and which bore the reported registration number in the Hunt Falls Bridge area of Lowell, MA. (App. p. 29). Officers Richardson and Morril drove towards that area; they spotted the truck, activated the cruiser lights and pursued the truck to Reed Street in the Centerville section of the city, where they pulled it over. (App. pp. 29-30).

Officer Richardson approached the truck with his service revolver out, ordered the respondent, who was alone, to

get out of the truck, and took him to the rear of the cab (halfway to the rear of the truck). (App. pp. 32, 33, 41). He asked him for identification. (App. p. 32). Officer Morril detained the respondent while Officer Richardson searched the front seat area of the truck and found a loaded .38 caliber pistol which was three or four inches under the seat on the driver's side of the transmission hump. (App. pp. 33, 36, 37). The weapon was located in an area to which the driver of the vehicle would "absolutely" have had access. (App. p. 43). The handgun matched the description of the gun seen earlier by the store clerk. (App. p. 33). Officer Richardson examined the handgun and removed the bullets. (App. p. 34). Officer Richardson testified he was not in fear of safety while he was searching the truck. (App. p. 42). He then advised

the defendant of his Miranda rights and asked respondent if he had a license for the gun. (App. pp. 34-35). The respondent replied that he did not and he was placed under arrest for unlawfully carrying a firearm without a license. (App. p. 35).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT THAT THE FOURTH AMENDMENT PROHIBITS A BRIEF INVESTIGATIVE STOP WHERE POLICE HAVE RELIABLE INFORMATION THAT A SUSPECT IS CARRYING A WEAPON IN PUBLIC CONFLICTS WITH DECISIONS OF THIS COURT AND LOWER FEDERAL AND STATE COURTS.

If allowed to stand, the decision of the Supreme Judicial Court will prevent police officers from conducting a stop, pursuant to Terry v. Ohio, 392 U.S. 1 (1968), to search for a handgun or to ask a suspect whether he has a license to carry a handgun even though the police are informed that the suspect is

carrying a handgun late at night in a convenience store and on public roadways.[2/]

A. The Decision Below Conflicts With Decisions Of This Court.

Couture is wrong as a matter of federal constitutional law upon which it is based; it is directly contrary to Terry v. Ohio, 392 U.S. 1 (1968), Adams v. Williams, 407 U.S. 143 (1972) and their progeny. In Terry, this Court held for the first time that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no

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2/ It is also submitted that, while as argued infra, reasonable suspicion is sufficient to justify the stop and search, there was also sufficient information to provide probable cause to believe that respondent was carrying an unlicensed firearm. This petition only addresses the reasonable suspicion argument.

probable cause to make an arrest" and that if he reasonably concludes "in light of his experience that criminal activity may be afoot and that persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others . . . to conduct a carefully limited search" for concealed weapons. Terry, 392 U.S. at 22. The purpose of the stop is to conduct a brief investigation that would quickly confirm or dispel suspicion that criminal activity was afoot. United States v. Sokolow, ___ U.S. ___, 109 S.Ct. 1581, 1587 (1989); United States v. Place, 462 U.S. 696 at 702, 703 (1983); Terry, 392 U.S. at 30; United States v. Cortez, 449 U.S. 411 at 417-419. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that

intrusion." Terry, 392 U.S. at 21. A determination of the reasonableness of the seizure and search involves a dual inquiry "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. Moreover, this Court has repeatedly stressed that in evaluating the validity of the initial stop, it is the totality of the circumstances -- the whole picture confronting the police officer. United States v. Sokolow, at 1585.

The touchstone of the analysis under the Fourth Amendment is always "the reasonableness in all the circumstances." Terry, 392 U.S. at 19, 22; Pennsylvania v. Mimms, 434 U.S. 106, 108-109 (1977); United States v. Place, 462 U.S. at 702-703, 706. In turn,

reasonableness of both the initial stop and subsequent search depends on balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." Id. at 703; Terry, 392 U.S. at 22.

The stop and pat down of the suspect in Terry was held reasonable under the Fourth Amendment when the interest of privacy of the suspect was weighed against the important government interests of crime detection and prevention, id. at 22, and the need for law enforcement officers to conduct a

limited search for weapons to protect themselves and other prospective victims of violence while they are conducting the investigation. Id. at 24. In Adams v. Williams, 407 U.S. 143 (1972), this Court applied Terry principles to hold that, where a known informant told a police officer that an individual was sitting in a particular car and was carrying narcotics and a gun at his waist, a police officer was justified in reaching into the car and seizing the weapon from Williams's waist. Id. at 146-147. The court held that the officer was, in the first instance, "properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high crime area at 2:15 a.m." Id.

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his

> shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. at 145-146.

Most importantly, this Court held that finding the gun precisely where the informant said it would be provided "probable cause to arrest Williams for unlawful possession of the weapon." Id. at 148; (emphasis added). Moreover, in so holding the Court "expressly rejected the view that the validity of a Terry search depends on whether the weapon is possessed in accordance with state law." Michigan v. Long, 463 U.S. 1032, 1052 n.16 citing Adams v. Williams, 407 U.S. at 146. Indeed, in this regard it is

important to note that in Adams, the dissent strongly argued that the initial stop was improper because under Connecticut law it was permissible to possess a gun if one had a license. Id. at 158-159 n.7. (Marshall, J. dissenting).

The information was deemed reliable simply because the officer knew the informant, who came forward personally and the police officer immediately verified the information at the scene. Adams, 407 U.S. at 148. See also Alabama v. White, ___ U.S. ___, 110 S.Ct. 2412 (1990) (anonymous tip provided reasonable suspicion for initial stop where caller provided name of woman, description of automobile, her destination and that she would be carrying an ounce of cocaine and police verified information at scene). The information therefore provided reasonable suspicion to believe that the

suspect was armed and potentially dangerous to the officer or others, and entitled him to "pursue his investigation without fear of violence, . . . whether or not carrying a concealed weapon violated any applicable state law." 407 U.S. at 146. If the informant's unverified tip in Adams that the suspect was carrying a gun and narcotics was enough to justify a Terry stop, and the seizing of the gun from the suspect's waist was sufficient to provide probable cause that the weapon was unlicensed, then surely the information in the instant case provided reasonable suspicion for the initial stop.[3/] (discussed infra).

3/ As noted supra, although a finding of reasonable suspicion is dispositive of this case, it is submitted the information was sufficient to provide probable cause that the weapon was unlicensed.

In Terry, Adams v. Williams, 402 U.S. 143 and Michigan v. Long, 463 U.S. 1032 (1983) it was the reasonable suspicion that the suspects were armed and that they might be dangerous, combined with the importance of the related governmental interests in protecting the public and the police and in detecting and preventing crime were the most significant factors justifying a Terry stop and search for weapons.[4/]

4/ See also, United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (strong governmental interest in keeping illegal aliens out of country allows brief investigative stop near border for questioning about citizenship and immigration status); United States v. Place, 462 U.S. 696 (1983) (strong governmental interest in stopping drug courier activity at airports allows police to make brief investigative stops of persons and their baggage at airport on reasonable suspicion of drug trafficking because it substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels).

> We think it too plain for argument that the State's proffered justification -- the safety of the officer -- is both legitimate and weighty. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Terry v. Ohio, supra at 23. And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. "According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings - A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)." Adams v. Williams, 407 U.S. 143, 148 n.3 (1972).

Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam) (given risk to officer, proper to order minor traffic offender out of vehicle even though no foul play suspected at time of stop); Michigan v. Long, 463 U.S. at 1047; Adams v. Williams, 407 U.S. at 148 n.3. It should also be "too plain for argument"

that the same governmental interest here is compelling -- i.e., protecting the public from inherently dangerous instrumentalities such as firearms and to that end investigating the carrying of them in public and whether those who are doing so have a license. "The context of a particular law enforcement practice . . . affect[s] a determination of whether a brief instrusion on Fourth Amendment interests on less than probable cause is essential to effective criminal investigation. United States v. Place, 462 U.S. at 704. The "context" here is the inherent dangerousness of firearms and Massachusetts law aimed at reducing that danger.

Current statistics of firearm violence suggest that it has reached epic proportions. See Turley and Rooks, Firearms Litigation Law, Science and

Practice, Vol. 1, p. 13 (1988). "[T]he hard figures which have been collected annually for decades by law enforcement agencies, safety professionals, and the medical profession show that the problem is great -- some would say, staggering . . ." Id. at 5. "There may be 30 to 50 million handguns in private hands and 2.5 million more are being manufactured annually." "A new handgun is now sold every 13 seconds, a handgun-related injury occurs every two and one-half minutes and a death results every 20 minutes." Id. at 10, 11. F.B.I. statistics for the year 1988 reveal that in the case of homicides approximately 11,084 involved the use of a gun. "Of the total number of murders reported in 1988, 45% were by handgun, 6% by shotgun, 4% by rifle and 5% by another or unknown type of firearm." Hogan, H.,

Congressional Record Service Issue Brief, Gun Control, The Library of Congress, No. IB890093 p. 7 (April 3, 1980). A study by the Bureau of Justice Statistics in 1986 revealed that "during the 10-year period 1973-1982, . . . half of all robberies, a third of all assaults, and a fourth of all rapes were committed by armed offenders. Of these armed offenders, 35% involved a gun." Id. "The easy availability of firearms to potential criminals . . . is well known . . . [and] is relevant to an assessment of the need for some form of self-protective search power." Terry, 392 U.S. at 24 n.21.

In light of the potential danger created by the unlawful carrying of firearms, the inherent dangerousness of firearms, and the significant role that firearms play in crime, Massachusetts has adopted a restrictive statutory scheme

and "harsh inflexible penalties . . . needed to serve as a deterrent. . . ." Deterrence is the primary objective of the statute. Commonwealth v. Jackson, 369 Mass. 904, 911, 919, 314 N.E.2d 166, 171, 176 (1976); Commonwealth v. Lindsey, 396 Mass. 840, 842-843, 489 N.E.2d 666 (1986). Mass. Gen. Laws c. 269, §10 mandates a one-year mandatory minimum jail sentence for any person who carries under his control in a vehicle a firearm, loaded or unloaded without having in effect a valid license.[5/] Most

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5/ Under Massachusetts law, a non-resident who wishes to carry a handgun while traveling through the Commonwealth must have a Massachusetts license pursuant to Mass. Gen. Laws, c. 140, §131 (one who has a place of business in the Commonwealth may apply for a license) or he must have a temporary license under the exemptions provided by §131F (temporary license for one year) or §131G, (e.g. pistol or revolver competition), neither of which apply here. Commonwealth v. Landry, 6 Mass. App. Ct. 404, 405, 376 N.E.2d 1243 (1978).

importantly, G.L. c. 140, §129C allows a police officer to demand the production of any person's gun license so long as that person is not on his own property:

> Any person who, while not being within the limits of his own property or residence, . . . and who is not exempt under this section, shall on demand of a police officer or other law enforcement officer, exhibit his license to carry firearms . . . Upon failure to do so, such person may be required to surrender to such officer said firearm, rifle or shotgun which shall be taken into custody. Id.

"Against [the] strong governmental interest, . . . must [be] weigh[ed] the nature and extent of the intrusion upon the individual's Fourth Amendment rights where police briefly detain [him] for limited investigative purposes." United States v. Place, 462 U.S. 696, 705 (1983). The Amendment does not protect

the merely subjective expectation of privacy but only "those expectations that society is prepared to recognize as 'reasonable.' Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735 (1984) quoting Katz v. United States, 389 U.S. 347, 360 (1976). In New York v. Class, 475 U.S. 106, 114-115 (1986), this Court held that because of the important role played by the vehicle identification number in the pervasive governmental regulation of the automobile and efforts by government to ensure VIN is placed in plain view, there was no reasonable expectation of privacy in the VIN." "[A] demand to inspect the VIN, like a demand to see license and registration papers is within scope of police authority pursuant to a traffic violation stop."

There is a diminished, if not total lack of legitimate expectation of privacy

here because of: the inherently dangerousness of firearms; the pervasive regulation of firearms; the statute entitling a police officer to demand a license; and the manner in which the firearm was displayed in a public store.

1. The Initial Stop

Applying the principles of Terry and Adams to the facts of this case, it is clear that the "reasonableness in all the circumstances," Long, 463 U.S. at 1032, demonstrated that the initial stop here was justified.

It was at the late hour of 11:30 p.m. when the police received a radio transmission that a clerk in the Li'l Peach convenience store on Rogers Street in Lowell, MA. had telephoned to alert police as to the unusual circumstance of seeing a patron walking around the store

with a handgun, a derringer, protruding from his back pocket. See Michigan v. Long, 463 U.S. at 1050 (the hour was late and the area rural). The clerk gave the police a detailed description of the gun, a description of the color and make of the pickup truck, and the exact New Hampshire license plate. He also provided them with the direction in which the truck was travelling. Even absent explicit expression of fear by the clerk or any statement of opinion that the person in the store was "casing it" to rob it, it would seem obvious from the information the clerk provided (and the fact that he called the police to provide it) that he was in fear, had some grave concern as to the patron's behavior, or that he as a citizen believed there was the potential for criminal activity. Terry, 392 U.S. at 30. The reliability

of this tip as part of the basis upon which the police officers formed a reasonable suspicion that criminal activity was afoot is unquestionable and indeed the stop was not challenged on that basis. Adams v. Williams, 407 U.S. at 146-148; Alabama v. White, 110 S.Ct. at 2416-2417. In any event, "[t]his is a stronger case than obtains in the case of an anonymous telephone tip." Adams, 407 U.S. at 146. It was called in by a named citizen working late at night at a familiar business establishment within the officer's jurisdiction, and the information he gave was immediately verified at the scene. Adams, 407 U.S. at 146; Alabama v. White, 110 S.Ct. at 2416-2417.

The facts that the event occurred at 11:30 p.m. in a convenience store in a

large metropolitan area,[6/] and that the officer had been a member of the Lowell Police Department with nine years' experience also support a finding of reasonable suspicion. Terry, 392 U.S. at 23. In all situations the officer involved is entitled to assess the facts in light of his experience in detecting crime. Id. United States v. Brignoni-Ponce, 422 U.S. at 884-885 (officers may consider the characteristics of the area, behavior of

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6/ The population of Lowell, MA was estimated at 94,070 in 1988. Bureau of the Census, U.S. Dep't of Commerce, No. 88-NE-SE, Current Population Reports, p.18 (1988). The 1987 F.B.I. Uniform Crime Reports show that in 1987 cities of the size of Lowell, robberies of commercial and financial establishments accounted for 23% of the robberies. In the Northeastern states firearms were used in 25% of the robberies. See Federal Bureau of Investigation, Uniform Crime Reports for the United States - 1987, at 18. In 1988 convenience store robberies showed the greatest increase, 16%. Id., 1988 Crime Reports at 19.

suspect). Moreover, Officer Richardson testified that after he activated the cruiser lights he "pursued" the truck from the Hunt Falls Bridge area to Reed Street in the Centerville section. That respondent did not immediately pull over was also a factor which could fairly heighten a seasoned officer's suspicion.

In addition, the facts that the object of the search was an inherently dangerous weapon and that the area to be searched was a moving vehicle contribute to a finding of reasonableness -- because the stop here "was imbued with a concern for the speedy investigation of suspects using an automobile on public streets, potentially armed with a deadly weapon." Clark v. State, 171 Ind. App. 658, 358 N.E.2d 761, 763 (1977); see California v. Carney, 471 U.S. 386, 390 (1985) (mobility of automobile inherently created exigency). The fact that the

truck had a New Hampshire registration is also relevant to a determination of reasonable suspicion to believe the suspect was carrying an unlicensed firearm. As discussed infra, it is a rational inference that a New Hampshire resident would have been less likely to have obtained a Massachusetts license or fall within one of the limited exemptions of G.L. c. 140, §§131F or 131G.

Reasonable suspicion is a "much less demanding standard than probable cause." Probable cause means "a fair probability that contraband or evidence of a crime will be found." Alabama v. White, 110 S.Ct. at 2416. Reasonable suspicion can be established with information that is even "less reliable than that required to show probable cause." Id. See United States v. Place, 462 U.S. 696 (1983) (reasonable suspicion that Place was trafficking in narcotics based on fact

that although Place complied with request to examine his airline ticket and identification, there were different addresses on his bags and neither address existed); see United States v. Sokolow, 109 S.Ct. at 1581. Police officers are entitled to "formulate[ ] certain common sense conclusions about human behavior." Id. at 1585 quoting United States v. Cortez, 449 U.S. 411, 418 (1981).

In making a determination of reasonable suspicion for an investigative stop, the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts. Id. at 1587. "It would have been poor police work indeed" for the officers not to have investigated this call, Terry, 392 U.S. at 23, particularly in light of the fact that Mass. Gen. Laws c. 140, §129C, explicitly entitles a police

officer to demand a license to carry firearms from someone on public roadways.

2. The Scope of the Search and Seizure Was Proper.

The search of the truck was strictly tied to, and justified by, the circumstances which rendered its initiation permissible. Terry, 392 U.S. at 19; Michigan v. Long, 463 U.S. at 1049-1050. It was based on reasonable grounds to believe the suspect was armed and possibly dangerous and was proportioned in scope. Terry, 392 U.S. at 28-30. The search was limited to those areas in the vehicle to which the suspect would generally have had access. Michigan v. Long, 463 U.S. 1032, 1049 (1983). In fact, Officer Richardson testified it was found where the driver "absolutely" had access.

In Michigan v. Long, 463 U.S. at 1049, Long was still deemed to have

"access" notwithstanding the fact that he was alone, dazed and at the rear of the car under the custody of two armed police officers, because the possibility existed that the suspect "might break away from police control and retrieve a weapon from his automobile." Id. at 1051. Just as important, the Court held, is the interest in protecting the public. The vehicle should be searched for weapons because "if the suspect is not arrested he will be permitted to reenter his automobile and have access to any weapons inside." Id. at 1052.

"The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." Terry, 392 U.S. at 287. In this regard, it was not improper that Officer Richardson approached the vehicle with his revolver drawn. United States v. White, 648 F.2d

29, 36-37 (D.C. Cir.), cert. denied, 454 U.S. 924 (1981), or that he ordered respondent out of the car. Pennsylvania v. Mimms, 434 U.S. at 110. Through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training, the officer acted reasonably in being prepared for possible violence. White, 648 F.2d at 36-37; United States v. Aldridge, 779 F.2d 368 (11th Cir. 1983); United States v. Trullo, 809 F.2d 108, 113 (1st Cir. 1987).

According to the Federal Bureau of Investigation, seventy-six law enforcement officers were killed by firearms in the line of duty in this country in 1988, an increase of five percent over the 1987 total. Federal Bureau of Investigation, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted - 1988, at 3. From 1984 to

1988 13% of the 368 officers slain in that period were murdered during traffic pursuits and stops. Id. at 16.[7] From 1984 to 1988, 39.4% of the officers killed were slain between the hours of 6 p.m. and midnight. Id. at 14. Therefore, Officer Richardson, approaching the truck of a person known to have a gun at the late hour of 11:30 p.m. in a large metropolitan area such as Lowell would be at great risk without drawing his revolver and/or securing the suspect's gun. There is no requirement that the particular officer be in fear. W.R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, Vol. 3 at 504-505 n.22 (2d ed. 1987). The standard is an objective one; whether a

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7/ In addition, a ten year period (1979-1988) indicates that the majority of fatal shootings of officers occur from a distance of five feet or less. Id. at 13.

reasonably prudent person would believe a suspect may be armed and dangerous. Terry, 392 U.S. at 21-22.[8/]

The officer's stop and search was based on reasonable suspicion and the search was proportioned in scope. The Supreme Judicial Court has

> blind[ed] itself to the need for law enforcement officers to protect themselves and other prospective victims of violence where they may lack probable cause for arrest.

Terry, 392 U.S. at 24. The Fourth Amendment emphatically does not require this. Nor does it require that "an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the

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8/ The Supreme Judicial Court noted that Officer Richardson testified that he was not "in fear while he was searching the truck" but did not utilize this factor in its analysis.

answer might be a bullet." Terry, 392 U.S. at 33.

B. The Courts Of Appeal Of The Various Circuits And The State Courts Are In Conflict Over Whether Facts Such As Those Presented Here Would Provide Reasonable Suspicion For A Terry Stop.

In 1981 three Justices of this Court, in dissenting from the denial of certiorari in White v. United States, 454 U.S. 924 (1981)[9/] stated that there was "conflict and confusion" in the state and federal courts over whether an anonymous tip may furnish reasonable suspicion for an investigatory stop. Id. at 925-926.

9/ The facts in White were similar to those in Couture. There, police received an anonymous call that a black man wearing a blue jumpsuit had entered a described car at a particular address and would be carrying drugs upon his return. Where police corroborated the information the D.C. Circuit held there was reasonable suspicion for a Terry stop. United States v. White, 648 F.2d 29 (D.C. Cir. 1981).

> While the determination of reasonable suspicion is heavily dependent on the specificity of the information, the amount of verification, and the urgency of a particular situation, the conflicting results cannot be explained as accounting for different factual patterns. Compare People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562 (1976) (anonymous call that black man in bar wearing red shirt had gun; no reasonable suspicion), with State v. Jernigan, 377 So.2d 1222 (La. 1979) (anonymous call that black man in bar wearing yellow shirt and blue pants had gun; reasonable suspicion), cert. denied, 446 U.S. 958 (1980). Also compare Jackson v. State, supra (anonymous call that man in car, precisely located, had gun; no reasonable suspicion), with People v. Taggart, supra (anonymous call that man on corner, precisely located, had gun; reasonable suspicion).

Id. at 926 n.2.

A number of the state cases cited and one federal case, United States v. Gorin, 564 F.2d 159 (4th Cir. 1977), present fact situations very similar, if not identical, to those of the present case. More recent cases disclose that there is

still conflict in the state and lower federal courts, and that the anonymity and/or reliability vel non of the informant is not the deciding factor. Rather, the crucial question is whether, even if what the reliable informant stated is true and particularized, there is enough to provide reasonable suspicion. As demonstrated below, while the D.C. Circuit, Fourth, Eleventh and, possibly, the First Circuits would have found reasonable suspicion to conduct an investigative detention in Couture, the Fifth Circuit would not have so found.

United States v. McClinnhan, 660 F.2d 500 (D.C. Cir. 1981), involved an anonymous call that a black man walking in a described location had a sawed-off shotgun in his briefcase. The D.C. Circuit Court of Appeals held that the stop and search was justified under Terry

and Adams, notwithstanding the fact that the existence of the gun was not verifiable until post-seizure, the stop and search was warranted given the danger to the public and the lack of other alternatives.

> Either they stopped McClinnhan on the basis of the tip as corroborated by their observation or they could at best follow him through the streets of Washington hoping he would commit a crime, or at least brandish the weapon. . . Either they ignored their reasonable suspicion or they took some action. We think that where their suspicion has some objective foundation, the Fourth Amendment does not, particularly where the reported contraband is as lethal as a sawed-off shotgun, require a police officer to ignore his well-founded doubts and . . . will permit an investigative detention.

McClinnhan, 660 F.2d at 503-503.

The Fourth Circuit has upheld a stop and frisk under facts nearly identical to those in Couture, United States v. Gorin, 564 F.2d 159 (4th Cir.) cert. denied, 434

U.S. 1080 (1978) (anonymous call that particularly described man with a gun was in bar although no other suspicious acivity; reasonable suspicion), and the Eleventh Circuit has also done so on facts much less compelling than the instant case. See United States v. Aldridge, 719 F.2d 368 (11th Cir. 1983) (officer receives information over radio that tenant in building nearby reported "suspicious persons in or around a construction site fooling with vehicles" and describing automobile; reasonable suspicion). The First Circuit has not ruled on precisely the facts presented here but has emphasized that the very purpose of a Terry stop is to search for weapons and that actual suspicion of weapons has been the crucial element in investigative detention cases. United

States v. Lott, 870 F.2d 778, 784 (1st Cir. 1989). Contra United States v. McLeroy, 584 F.2d 746 (5th Cir. 1978) (anonymous tip that man had shotgun in particularly described vehicle at a given address and police verified car, registration number and that address was McLeroy's; no reasonable suspicion because no information McLeroy involved in a crime).

The state courts are in similar conflict and disarray. Compare State v. Fayard, 537 So.2d 347 (La. App. Ct. 1988) (doorman in bar informs police officer that suspect had a gun under his shirt; reasonable suspicion to stop and frisk); State v. Jernigan, 377 So.2d 1222 (La. 1979), cert. denied, 446 U.S. 958 (1980) (anonymous call that black male wearing described clothing was sitting in a bar

with a gun; reasonable suspicion); Clark v. State, 171 Ind. App. 658, 358 N.E.2d 761 (1977) (hospital security guard calls police and reports two suspicious looking men in particularly described car have a gun; reasonable suspicion); and Johnson v. State, 439 A.2d 607 (Md. App. 1982) (unidentified citizen approaches police officer and tells him particularly described man in a restaurant had a gun; reasonable suspicion; with People v. Torres, 74 N.Y.2d 2201, 543 N.E.2d 61 (N.Y. 1989) (anonymous call that man wanted on homicide charges could be found in a particularly described business establishment, including physical description, type of car and clothing and fact that carrying a gun in a shoulder bag; no reasonable suspicion); People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562

(1976) (anonymous call that black man in bar wearing red shirt; no reasonable suspicion); and Jackson v. State, 157 Ind. App. 662, 301 N.E.2d 370 (1973) (anonymous caller that man in car, precisely located, had gun; no reasonable suspicion).

The foregoing demonstrates disarray and conflict in the federal and state courts on a fundamental issue which confronts thousands of police officers on a frequent basis. The effect of such uncertainty can only be deleterious to police officers charged with honoring constitutional guarantees as well as protecting the public and detecting and preventing crime.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts should be granted.

Respectfully submitted,

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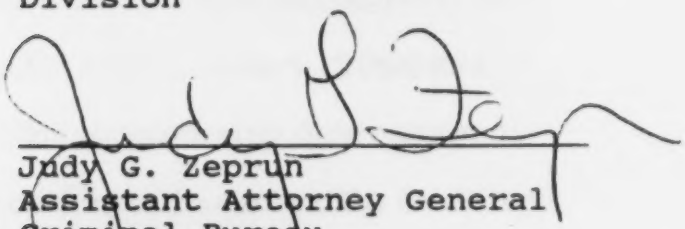

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